SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF SUPPORTING THE PETITION.

WILLIAM H. BOYD,
JAMES E. CALKINS,
ROBERT H. ANDERSON,
Counsel for Petitioner.

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No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,
Petitioner and Appellant Below,

vs.

CITY OF MIAMI, FLORIDA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Highway Construction Company of Ohio, Inc., a corporation organized and existing under the laws of the State of Ohio, respectfully shows:

I.

Summary Statement of Matter Involved.

This is an action at law, brought in the United States District Court, Southern District of Florida, by Highway

Construction Company of Ohio, Inc., a corporation organized and existing under the laws of the State of Ohio, petitioner herein, against the City of Miami, Florida, respondent herein, on seven paving contracts, designated respectively PV 69 to PV 75, inclusive. These contracts, including the plans and specifications, are identical in every respect, except the description of the streets to be paved, the quantity of work to be performed, and the amount of bond to be given by the petitioner as a guarantee for performance. The petitioner commenced the work simultaneously under each contract in the early part of 1926, and fully completed the work, under the direction of the City Engineer, in the latter part of December, 1926. From time to time, as the work progressed, payments were made by the respondent to the petitioner.

The respondent, on completion of the contracts, accepted the work as satisfactorily executed according to the plans and specifications (R. 4350, R. 4352), and the City Engineer prepared final estimates which show an aggregate balance due the petitioner from the respondent of $23,263.15 (R. 4214, R. 4290).

The petitioner refused to accept the amount so found to be due by the City Engineer, for the reason that said estimates did not include any compensation for work performed and materials furnished on the order of the City Engineer in excess of the amounts and of the same kind as named in the Instructions to Bidders, and changes in the quantity or cost of work and material, consisting of claims for:

Additional depth of laying rock foundation (R. 644), additional depth of inlets (R. 524), additional depth of catch basins (R. 554), reconstruction of old manholes (R. 1073), additional depth of laying sewer pipe (R. 615), additional depth of grading (R. 911), grading the area occupied by the curb and gutter (R. 938), increased cost of coarse aggregate (R. 1311), increased cost of finishing sub-

grade (R. 747), increased cost of rock used in the foundation (R. 1173), and increased cost of work in patching curb and gutter (R. 1233). These claims, aggregating more than $480,000, computed at the unit price specified in the contract, together with a small claim for extra work and material in the sum of $2,204.62 (R. 4301), were completely ignored by the Engineer in his report and final estimate to the Commission of the City of Miami (R. 4214, 4287, 4356 to 4364).

This suit is to recover compensation for such excess or additional work and material, and for such increased cost of work and material, performed and supplied under the express provisions of paragraphs 7 and 9 of the contracts (R. 4134-4).

The amended declaration, on which the case was tried, contains 71 counts, and any synopsis of it is too long to be included in this petition. It may be found on pages 13 to 187 of the record. Certain counts of said amended declaration were amended, and these amendments may be found on pages 290 to 353 of the record. The pleas and defenses are many and long, too long to include a synopsis thereof in this petition. They may be found on pages 202 to 207, 221 to 239, 253 to 266, 334 and 3913 of the printed record. The petitioner made an effort to have the pleadings settled before the trial, and assigned for hearing its motion to strike certain matters from the petitioner's reply to the respondent's counterclaim, but the trial court decided that it would defer rulings until the trial of the cause (R. 256), and thereafter neither the petitioner nor the respondent made any further effort to have the pleadings settled or issues made up prior to the trial, and the parties went to trial without the pleadings having been settled; and all the evidence was introduced, requested charges presented, and argument on both sides completed without the pleadings having been settled. It was not until the trial court came to deliver its final charge to the Jury that any rulings were

made (R. 3907-3921), and the rulings then made, after the evidence was all in and after the case had been argued before the Jury, were futile acts.

The trial was by Jury. There is very little dispute as to matters of fact. The record will disclose that at least 90% of the testimony is nothing more than the opinions of witnesses as to how they think the contracts sued on should be interpreted, and argument between counsel and witnesses concerning such interpretation. The case, in the main, before the Jury was a dispute, not of fact but of interpretation, of the contracts and plans and specifications made a part thereof, which the trial court refused to construe and left the Jury free to put its own interpretation thereon.

Special verdicts were rendered in favor of the respondent on the claims of the petitioner for said additional work, and a special verdict was rendered in favor of the petitioner for the amount shown as owing to the petitioner on the final estimates of the City Engineer (R. 4517), and judgment was entered accordingly (R. 4629). The petitioner's motion to set aside the special verdicts in favor of the respondent and to grant it a new trial (R. 4524) was denied by the trial court (R. 4628).

An appeal from said judgment was taken by the petitioner to the Circuit Court of Appeals (R. 4639), and said appellate court entered, on February 25, 1942, its judgment modifying the judgment of the District Court to the extent of allowing interest on the $23,263.15 special verdict in favor of the petitioner, and, as so modified, affirmed the judgment in all other respects (R. 4746).

II.

Jurisdictional Statement.

(1) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended, Sec. 347, Title 28, Ch. 9, U. S. C. A., 1940 Ed., page 2533.

(2) The date of the judgment of the Circuit Court of Appeals sought to be reviewed is February 25, 1942 (R. 4746).

(3) The time for filing a petition for rehearing in the Circuit Court of Appeals was enlarged on March 6, 1942, to March 30, 1942 (R. 4747).

(4) The petition for rehearing was presented on March 26, 1942 (R. 4753) and denied on April 6, 1942 (R. 4778).

(5) The mandate of the Circuit Court of Appeals was stayed, on April 13, 1942, for a period of three months from April 6, 1942, to enable the petitioner to apply for a writ of certiorari from the Supreme Court (R. 4782).

(6) Federal jurisdiction in the District Court was invoked on the ground of diversity of citizenship. The amount in controversy is alleged and conceded to exceed $3,000, exclusive of interest and cost.

(7) The opinion of the Circuit Court of Appeals will be found on pages 4737-4745 of the certified copy of the record of said Circuit Court of Appeals, and is reported in 126 Federal Reporter, 2d Series, 777.

(8) The date on which this petition for writ of certiorari and supporting brief, and the record, were filed with the Clerk of the Supreme Court is June 11, 1942.

III.

The Questions Presented to the Circuit Court of Appeals for Decision.

The principal questions presented on said appeal were:

(1) Were the special verdicts in favor of the respondent on the petitioner's claims for additional and extra work and materials supported by the evidence and the law?

This question arose by the trial court's refusal to set aside said verdicts, on motion of the petitioner, and to grant the petitioner a new trial (R. 4524-4566, 4591, 4596, 4598).

(2) Was the trial court justified in leaving to the Jury the question of law of what was additional work and what was extra work under the contracts sued on (R. 3995-4003), the contracts having clearly defined what was additional work and what was extra work, and the petitioner having requested the Court to instruct the Jury that the petitioner's claims for additional depth of inlets, additional depth of catch basins, additional depth of rock foundation, additional depth of excavation, and for laying sewer pipe to an additional depth, were not claims, within the purview of the contracts, for extra work performed (R. 4497), which the Court refused (R. 4083)?

(3) Was the trial court justified in leaving to the Jury the question of whether or not, under the contracts sued on, the provisions in the contracts relating to extra work to the effect that "no claim whatever for extra work will be considered or paid except only when ordered in writing by the Engineer" etc., applied to the performance of additional work and material (R. 3996); the contracts having definitely confined the application of such provision to extra work, and the petitioner having requested the Court to charge the Jury that quantities of work and material in excess of those named in the Instructions to Bidders, and of the same kind, were not to be considered as extra work (R. 4497), which the Court refused (R. 4083)?

This question arose in connection with the petitioner's claims for additional depth of inlets and catch basins, additional depth of rock foundation, and for laying sewer pipe to an additional depth.

(4) Was the trial court justified in leaving the Jury to decide whether or not a predicate had been properly laid by the petitioner, under the "doubt and obscurity" provision contained in the contracts sued upon, for the admission of parol evidence that the City Engineer had explained to the petitioner the meaning of certain plans and specifications which were made a part of said contracts (R. 3985, 4033)?

This question arose in connection with the petitioner's claims for increased cost of coarse aggregate used in the binder course and increased cost of rock used in the foundation.

(5) Was the trial court justified in leaving the Jury to decide whether the said contracts sued on required orders for additional or increased quantities of work or material to be placed in writing by the City Engineer (R. 3996); the said contracts having definitely provided, in this respect, that the right was expressly reserved for the City Engineer to increase quantities, of the same kind as mentioned in the Instructions to Bidders, to such extent as he might find necessary for the proper completion of the work (Par. 7, page 4132)?

This question arose in connection with the petitioner's claims for additional depth of foundation, additional depth of inlets and catch basins, and laying sewer pipe to an additional depth.

(6) Was the trial court justified in leaving the jury to decide whether the provisions of the specifications, relating to finishing the surface of the subgrade for the pavement, providing as follows:

> "When the rolling is completed the surface must be nowhere more than one inch above the true subgrade,"

applied to the whole area to be occupied by the pavement and its foundation (R. 4025), the specifications (R. 4146) having clearly so provided?

(7) Were the following charges of the trial court, given on its own initiative to the jury, relating to the petitioner's claims for increased cost of rock used in the foundation, in view of certain provisions contained in the contracts sued on, proper charges or improper and prejudicial to the petitioner?

> "In the first place, you are the judges as to whether there was doubt or obscurity as to this requirement that the rock was to have a cementing value of not less than 45, according to the standards of the Bureau of Public Roads. It is not a question of whether the representatives of the Highway Construction Company thought that there was obscurity as to this requirement. The question for you to determine first is whether as a matter of fact such specifications under the evidence that you have heard in the case did furnish a doubt or obscurity as to the specifications. If there was no doubt or obscurity, you go no further insofar as considering any oral explanation before the letting as constituting a part of the contract * * *" (R. 4033).
>
> "* * * The plaintiff had a right to ask an explanation of the meaning of the words (having a cementing value of not less than 45,) but if any explanation was given or said meaning was inconsistent with the other terms and conditions of the written contract, such explanation should have been reduced to writing and made a part of the contract" (R. 4035).
>
> "You also have for your consideration, question as to whether the claim is for extra work or for additional work * * *" (R. 4036).

The petitioner expressly objected to the charge given to the jury by the court in respect to the petitioner's claims for increased cost of rock used in the foundation (R. 4053-4) which was overruled by the court (R. 4058).

(8) Were the following charges of the trial court, given on its own initiative to the jury, relating to the petition-

er's claims for additional cost of "coarse aggregate" used in the asphalt binder course, in view of certain provisions contained in the contracts sued on, proper charges or improper and prejudicial to the petitioner?

"By this amendment the plaintiff invokes that provision of the instructions to bidders and brings into the case the principle of adding to the provisions of the contract the oral interpretation of the Engineer, made before the letting of the contracts. First you are to consider the fact that such oral conversations before the letting of the contracts can only become a part of the contract under the provision that the proposal itself makes a provision for an inquiry being made of the Engineer, prior to the submission of bids, and that that oral conversation resulting to an interpretation by the Engineer can only arise if there exists some obscurity or doubt with reference to the specifications, or some errors or omissions in regard to the plans (R. 4019-4020).

"* * * You are the judges as to whether there was a doubt or obscurity. If you decide that there was no doubt or obscurity, then the oral interpretation cannot be made a part of the contract. * * * I call your attention to the fact that there were other specifications with regard to the coarse aggregate in this three inch asphalt binder, and that the part of the plaintiff's claim set forth in its amended declaration, that local rock—meaning rock obtained from quarries in the Miami area—could and should be used as coarse aggregate in said asphalt binder course, and which then and there became and was the coarse aggregate specified to be furnished in said binder course, could not alter or make inapplicable the other provisions of the specifications in regard to the coarse aggregate. Hence it is, even though you may find for the plaintiff on the allegations with reference to this particular provision of the specifications, I charge you that other expressed and clear requirements of the specifications, if any, as

to the coarse aggregate in the three inch asphalt binder course, continued to be a part of the contract * * *" (R. 4020-21).

"* * * The City Engineer was under an obligation as well as within his right, in requiring that the rock in this three inch asphalt binder course should comply with the non-doubtful and non-obscure requirements, and the plaintiff was not entitled to rely upon an alleged oral agreement that local rock from some local quarry would satisfy the contract requirements, if thereby the non-doubtful or non-obscure provisions were ignored * * *" (R. 4021-2).

"* * * Of course, in addition to what I have stated in connection with this claim, you are to consider that charge I have given you in regard to the distinction between extra and additional work, with the charge as to waiver by estoppel, as to which I have fully charged you * * *" (R. 4022).

The petitioner expressly objected to the charge given to the Jury by the Court in respect to the petitioner's claims for increased cost of "coarse aggregate" for the binder course (R. 4053-4-5), which was overruled by the Court (R. 4058).

(9) Was the trial court justified in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely a question of law?

This question arose by action of the trial court in withdrawing from the consideration of the Jury the petitioner's said claim for additional grading or excavation (R. 3988), over its objection (R. 4051).

(10) Was the trial court justified in withdrawing from the consideration of the Jury the claims of the petitioner

for grading the area of the pavement occupied by the curb and gutter, regardless of the evidence, as being purely a question of law?

This question arose by the action of the trial court in withdrawing from the Jury the petitioner's claims for grading or excavating the curb and gutter area (R. 3988-9) over its objection (R. 4052).

(11) Was it prejudicial error for the trial court, when the Jury, after deliberating of their verdict, reported that they were "hopelessly tied up where they could reach no decision," to ask the Jury how they were numerically divided (R. 4092 to 4118)?

(12) Were the final estimates, showing the amount of the work performed and materials furnished by the petitioner, final and conclusive between the petitioner and respondent, under paragraph 6 of the contracts sued on, there being evidence to the effect that large quantities of additional and extra work and materials were performed and furnished by the petitioner to the respondent under said contracts and not included in said final estimates by the City Engineer?

All of said questions were duly raised and argued by the petitioner in said District Court and in said Circuit Court of Appeals.

IV.

Reasons Relied On for Allowance of Writ.

A.

The decision of said Circuit Court of Appeals, as to the alleged error of the trial court in refusing to interpret to the Jury the unambiguous provisions of the contracts sued

on by the petitioner, by holding that such error was in favor of the petitioner and that the petitioner may not be heard to complain (R. 4742), the said Circuit Court of Appeals, having found that the trial court declined to construe and pass upon the different sections of the contracts sued on, except in one or two instances (R. 4742), so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the lower court, as to call for an exercise of the power of supervision of the Supreme Court of the United States.

B.

The decision of said Circuit Court of Appeals, by holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner, in the absence of bad faith, fraud or deceit of the engineer (R. 4744), is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and is a decision in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Gammino* v. *Inhabitants of Town of Dedham,* 164 F. 593, on substantially the same matter.

C.

The decision of said Circuit Court of Appeals, on the alleged error of the trial court in asking the Jury how they were numerically divided after they had deliberated of their verdict and reported that they were "hopelessly tied up where they could reach no decision" (R. 4092 to 4118), by holding that the alleged error was lost to the petitioner because of its failure to object or except to such action of the trial court (R. 4744), is a decision of an important federal

question in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

D.

The decision of said Circuit Court of Appeals, by holding that the respondent was entitled to judgment as a matter of law on the petitioner's disputed claims for excess or additional work and material under the unambiguous terms of the contracts (R. 4744), so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

E.

The decision of said Circuit Court of Appeals, by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely questions of law, so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of the power of supervision of the Supreme Court of the United States.

Prayer.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 9938, *Highway Construction Company of Ohio, Inc., Appellant, versus City of Miami, Florida, Appellee,* to the end that this cause may be reviewed and

determined by this Court, as provided for by the Statutes of the United States; and that the judgment herein be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 4th day of June, 1942.

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Cleveland, Ohio,
and
JAMES E. CALKINS and
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BRIEF SUPPORTING PETITION FOR REVIEW ON WRIT OF CERTIORARI.

Specification of Errors of Circuit Court of Appeals.

1. The Circuit Court of Appeals erred in affirming the action of the trial court in refusing to interpret to the jury the unambiguous provisions of the contracts sued upon by the petitioner (R. 4742), the said Circuit Court of Appeals having found that the trial court declined to construe and pass upon the different sections of the contracts sued on, except in one or two instances (R. 4742).

2. The Circuit Court of Appeals erred in affirming the action of the trial court in asking the jury, after they had deliberated and reported that they were hopelessly divided where they could reach no decision, how they were numerically divided (R. 4744).

3. The Circuit Court of Appeals erred by holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner (R. 4733-4).

4. The said Circuit Court of Appeals erred by holding that,

> "As to the alleged 'extra work' the evidence is without dispute that no order for extra work was made by the engineer in writing, and that the claims were in excess of $500, the express limit of the engineer's authority under each contract. The provisions of paragraph 9 were completely ignored, and the contractor is not entitled to recover on these claims" (R. 4743).

in that only two claims of the petitioner for extra work exceeded $500 (R. 4297), and in that the engineer of the respondent refused to place any orders in writing for extra

work (R. 475, 486), and the City Commission paid claims of petitioners for extra work in excess of $500 which were not ordered in writing (R. 4292).

5. The said Circuit Court of Appeals erred by holding that the petitioner's

> "officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large additional claims" (R. 4743).

in that the petitioner was never consulted on the preparation of partial estimates (R. 461), and that at the time of the receipt by the petitioner of the second and third partial estimates, and during the progress of the work, the appellant requested the City Engineer to place the additional work in the partial estimates, but the Engineer stated that the additional or excess work and material would be paid for in the final estimates (R. 483, 560, 1313-14, 1328, 1449, 1557, 2351, 2353, 2355, 2357, 2360, 2431).

6. The said Circuit Court of Appeals erred in its finding that the petitioner violated the terms of the contracts (R. 4743), there being no evidence in the record to such effect, and the record discloses that the respondent accepted the work as having "been satisfactorily executed according to the plans and specifications" (R. 4349, 4350, 4351, 4352).

7. The said Circuit Court of Appeals erred by holding that Section 54 of the charter of the City of Miami, providing as follows:

> "When it becomes necessary in the opinion of the City Manager to make alterations or modifications in a contract for any public work or improvement such alterations or modifications shall be made only when authorized by the Commission upon the written recom-

> mendation of the City Manager. No such alteration shall be valid unless the price to be paid for the work or material, or both, under the altered or modified contract shall have been agreed upon in writing and signed by the contractor and the City Manager prior to such authorization by the Commission'' (R. 4739).

was important, and applicable to the questions presented in said cause, in that said Section 54 relates wholly to making "alterations or modifications in a contract for any public work or improvement," and no such questions were presented in the case. The questions presented were matters of "changes in the plans and specifications, consistently with the general intention of the contract, for any part of the work or materials" as expressly provided in paragraph 7 of the contracts (R. 4133) and "quantities of work or materials in excess of those named in the Instructions to Bidders and of the same kind," to be "paid for at contract rates," as provided in paragraph 9 of the contract (R. 4134), which "changes in the plans and specifications" and which "increased quantities of work and material" did not in any way alter or modify the contracts with the petitioner for public improvement.

8. The said Circuit Court of Appeals erred by holding that,

> "The Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work; that the work was done and the materials furnished and was accepted by the City; and that the City waived the conditions of the contracts. * * * The alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged additional work was done and materials furnished. Under the facts shown there was no waiver of the requirements of the contracts'' (R. 4742).

in that it has never been the contention of the petitioner that any provisions of the contracts were waived, excepting the sole covenant that "no claims whatever for extra work will be considered or paid, except only when ordered in writing by the Engineer," and only a very minor part of its claims was affected by such covenant, namely; its claims for extra work.

9. The said Circuit Court of Appeals erred by holding that the claims of the petitioner were based on changes, contradictions or variations by parol evidence of the written contracts (R. 4742), in that none of the claims were predicated upon any "change, contradiction or variation by parol evidence" of the contracts, but, with the exception of a claim for extra work amounting to $2,204.62, all the claims were based on written contracts, which provide in paragraph 7 thereof that,

> "The quantities of work and materials given in the Instructions to Bidders are approximate only * * *. The right is expressly reserved for the Engineer to increase or decrease these quantities * * * if such alteration increase the quantities, the added work or material will be paid for along with the original, at the rates stipulated in the contract. * * * If they increase or decrease the quantity or cost of work or materials beyond that described in the specifications and the proposal, the contract price will be accordingly modified * * *" (R. 4132).

10. The Circuit Court of Appeals erred by holding that the respondent was entitled to judgment as a matter of law on the disputed claims of the petitioner under the unambiguous terms of the contracts (R. 4744).

11. The Circuit Court of Appeals erred by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for excess or additional grading.

Summary of Argument.

POINT A.

The decision of said Circuit Court of Appeals, by holding that the trial court's refusal to interpret to the Jury the unambiguous provisions of the contracts sued on was harmless error (R. 4742), so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the lower court, as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The Circuit Court of Appeals found as a matter of fact as follows:

> "The court declined to construe and pass upon the different sections of the contracts, except in one or two instances." (R. 4742.)

The petitioner specified as errors of the District Court such refusal of the trial court to interpret or construe the various provisions of the contracts for the enlightenment of the Jury. (See questions (2), (3), (4), (5) and (6) in this petition under the heading "The Questions Presented to the Circuit Court of Appeals for Decision.")

In the case of *City of Orlando, Florida* v. *Murphy,* 84 F. (2d) 531, the Circuit Court of Appeals for the Fifth Circuit held that where the parties have reduced their agreement to writing, questions as to the construction of the contract are usually for the Court.

In 4 Ency. of Federal Procedure, page 922, it is stated that "the general rule is that it is the duty of the Court to construe written instruments, and to determine the meaning of plain words in whatever form of writing contained."

The refusal of the trial court to interpret the plain provisions of the contracts to the Jury was obviously very prejudicial to the petitioner, and departed from the ac-

cepted and usual course of judicial proceedings. See questions (2), (3), (4), (5) and (6) under the heading in the petition "The Questions Presented to the Circuit Court of Appeals for Decision."

Point B.

The decision of said Circuit Court of Appeals, by holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner, in the absence of bad faith, fraud or deceit of the engineer (R. 4744), is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and is a decision also in conflict with the decision of the Circuit Court of Appeals for the First Circuit on substantially the same matter.

The Circuit Court of Appeals has apparently construed the language contained in paragraph 6 of the contracts sued on (R. 4131) as making the engineer of the respondent sole arbiter of all disputes arising between the parties as to the legal interpretation of the contracts and as to the liability of the respondent to the petitioner (R. 4743).

The pertinent provisions of paragraph 6 are as follows:

> "All work done or materials furnished are to be subject to the acceptance or rejection of the Engineer, who shall in all cases determine the amount, quality, fitness and acceptability of the work and materials to be paid for and decide finally and conclusively all questions or differences of opinion that may arise as to the interpretation of the plans and specifications, or the fulfillment of the terms of this contract; and in the event of such question or difference, his decision is to be a condition precedent to the contractor's right to receive any money from this contract." (R. 4131.)

Said paragraph in the contracts clearly relates, and only relates, to the complete supervision and direction of the work during its progress, and the City Engineer's decision is made final and conclusive on questions arising during the progress of the work as to what is required by the contracts and in what manner it is to be done. This is necessarily so because it would not be practicable to cease operations and resort to a lawsuit every time a difference of opinion might arise during the progress of the work; but when the petitioner has followed the decision of the City Engineer and performed the contracts in accordance with his decision, then it becomes a question of law whether the petitioner is entitled to compensation for any particular item of work done at the direction of the City Engineer. Substantially the same question was before the Circuit Court of Appeals for the First Circuit in the case of *Gammino* v. *Town of Dedham*, 164 F. 593, and the Court held:

> "The jurisdiction of the engineer relates to disputes arising in the performance of the work which might prevent the work from progressing unless determined on the spot. The questions now presented are those which arose after the completion of the contract. The clause cannot be interpreted so as to deprive the parties of their rights to a judicial construction of the contract, so far as such construction involves matters of law relating to the present right of the plaintiff to maintain suit, and relating to the question whether the plaintiff has received such compensation as he was legally entitled to under the provisions of the contract, and under the evidence as to the acts of the parties not in terms fully covered by the express provisions of the contract." (Text 600.)

The Circuit Court of Appeals for the Fifth Circuit supported its ruling with the cases of *Duval County* v. *Charleston Engineering Co.*, 101 Fla. 810, 134 So. 509; *United*

States v. *Gleason*, 175 U. S. 588; *Sweeney* v. *United States*, 109 U. S. 618; and *Martinsburg* v. *Potomac R. R. Co.*, 114 U. S. 549.

In *Duval County* v. *Charleston Engineering Co., supra*, cited by the Circuit Court of Appeals, the Supreme Court of Florida held:

> "Final estimate may not be given conclusive effect as a final settlement of disputes arising under the contract, which disputes are legal in their nature and depend upon construction of the terms of the contract, their application to particular circumstances, and the like, for settlement." (Text 517.)

The record discloses very little dispute between the petitioner and respondent as to the amount of the work done and materials furnished (R. 497, 516, 636-7, 1038, 1071, 1448-9, 2357, 3309-10, 3351, 3413, 3510, 3531, 3551-2, 3602, 3702, 4214 to 87, 4311, 4433, and 4473 to 77), the dispute being primarily one of interpretation to be placed upon certain provisions of the contracts, and not one of the amount of work done or material furnished. The engineer for the respondent, in the preparation of his final estimates, proceeded to place his own interpretation on the contracts (R. 3428 to 3431), and excluded from his final estimates the petitioner's claims for additional work and material because at variance with his opinion of the interpretation of the contracts.

The holding of the Circuit Court of Appeals, in the case at bar, to the effect that inasmuch as the petitioner

> "made no attempt to show that the engineer, the city, or its agents were guilty of bad faith, fraud, or deceit, it may not recover" (R. 4744),

is quite inapplicable, because the dispute being primarily one of contract interpretation, there was no occasion to

attempt to show "bad faith, fraud, or deceit" on the part of the "engineer, the City, or its agents."

The Circuit Court of Appeals, in relying upon the foregoing Federal decisions, completely ignores the evidence as to the respondent's conduct in this case, which evidence makes inapplicable the principles announced in those decisions.

The record conclusively reveals that the respondent took a position concerning the final estimates of its engineer which implied that all such final estimates were erroneous, in the adoption of a resolution to arbitrate not only the claims asserted by the petitioner, but likewise its pretended claim against the petitioner (R. 3628-4354 —). Although it subsequently rescinded that resolution, it nevertheless filed an action against the petitioner by way of a counterclaim in this proceeding (R. 240). In filing a counterclaim, the respondent completely abandoned that provision of the contracts upon which the Court of Appeals' decision is grounded, and accordingly denied the correctness of the City Engineer's estimates. This counterclaim remained in the case for several years and was not withdrawn until after final argument before the Jury (R. 3913).

The Court, in the case of *Duval County* v. *Charleston Engineering Construction Co., supra,* did not introduce into the law of the State of Florida a new principle of law when it held:

> "Such a covenant is regarded as for the protection of the one who employs the contractor to perform work, and who designates the engineer who is to act under the contract of employment, and it is clear that such provision can be waived by failure to insist on it and taking a position which implies the contrary." (Text 516 So.)

The same court, in *Campbell et al.* v. *Kauffman Milling Co.,* 42 Fla. 328, 29 So. 435, many years prior to its decision

in the *Duval County* case, had approved and adopted the rule as stated in Bigelow on Estoppel, that

> "A party cannot, either in the course of litigation or in dealing in pais, occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position." (Text 435 So.)

In the later decision of *Mizell Live Stock Co.* v. *McCaskill Co.*, 62 Fla. 239, 56 So. 391, it was held that the doctrine of election of remedies applies to the "first pronounced act of election." The filing of a counterclaim was a "pronounced act of election," from which position the respondent could not thereafter withdraw.

The Court, in the *Duval County* case, also gave force and effect to the principle announced in *Gammino* v. *Inhabitants of the Town of Dedham,* 164 Fed. 593, in holding that,

> "It is likewise the rule that an ambiguous clause in a construction contract will be construed so as not to confer upon an engineer * * * power to decide legal questions arising out of the contract or its performance." (Text 515 So.)

Thus it appears that the decision of the Circuit Court of Appeals in the instant case is not only in conflict with the decision of the Circuit Court of Appeals for the First Circuit, but that it has decided an important question of local law in a way probably in conflict with applicable local decisions.

POINT C.

The decision of said Circuit Court of Appeals, by affirming the action of the trial court in asking the Jury, after they had deliberated and reported that they were hopelessly "tied up" to where they could reach no decision (R. 4092), how they were numerically divided (R. 4093), and by holding that the error was lost to the petitioner, because of its failure to object or except to such action of the trial court (R. 4744), is a decision of an important Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

The Circuit Court of Appeals held that, under "Rule 46 of the Rules of Civil Procedure for District Courts," the alleged error of the trial court in asking the Jury how they were numerically divided was lost to the petitioner, because it failed to make an objection to such action of the District Court (R. 4744).

The Supreme Court of the United States, in *Brasfield* v. *United States*, 272 U. S. 488, 71 L. Ed. 345, held:

> "It is reversible error for the trial judge to inquire, after the jury has for some time failed to agree, as to how they are numerically divided."

The Circuit Court of Appeals for the Eighth Circuit, in *St. Louis & S. F. R. Co.* v. *Bishard*, 147 Fed. 496, held the rule above announced in the *Brasfield* case, which was a criminal case, is equally applicable to cases of a civil character, page 500 of text.

Rule 46 of the Rules of Civil Procedure, referred to by the Circuit Court of Appeals for the Fifth Circuit, is as follows:

> "Exceptions Unnecessary. Formal exceptions to rulings or orders of the Court are unnecessary; but for all purposes for which an exception has heretofore

> been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

The only part of the above rule which could have any application to the question presented by said alleged error is as follows:

> "but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor."

It is apparent that the procedure prescribed by Rule 46 is intended to accomplish no more than the formal exception under the prior rules. In *Brasfield* v. *U. S., supra,* it was held that:

> "The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. * * * This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done." (Text 450 U. S.)

The record reveals that the action of the trial court in asking the Jury how they were numerically divided came with dramatic swiftness on the announcement of the Jury that it was "hopelessly tied up," and that the appellant did not expressly or impliedly consent to such action of the trial court (R. 4092-3). The court acted, in this re-

spect, without giving the slightest intimation of what he was going to do. The question presented here is one of proper relations of the trial court to the Jury, and could not have been effectively remedied by modification of the trial court's charge even if a formal objection had been made. The incident, and what immediately followed the incident, all being clearly prejudicial to the petitioner, will be found on pages 4092 to 4099 of the record.

POINT D.

The decision of said Circuit Court of Appeals, by holding that the respondent was entitled to judgment as a matter of law on the disputed claims of the petitioner under the unambiguous terms of the contracts sued on by petitioner (R. 4744), so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The seven contracts sued on (R. 4122 to 4213) contained general provisions as follows:

> Par. 6. "The supervision of the execution of this contract is vested wholly in the Engineer, and the orders of the Commission of the City of Miami are to be given through him. The instructions of the Engineer are to be strictly and promptly followed in every case" (R. 4131).
>
> Par. 7. "The quantities of work and material given in the instructions to bidders are approximate only and intended for the comparison of bids. The right is expressly reserved for the Engineer to increase or decrease these quantities * * *, if such alterations increase the quantities, the added work or material will be paid for along with the original at the rates stipulated in the contract * * *. The right is further reserved to change the plans and specifications * * * notice of such changes being given in writing to the

> Contractor * * *. If they increase or decrease the quantity or cost of work or material beyond that described in the specifications and the proposal, the contract price will be accordingly modified" (R. 4132).
>
> Par. 9. "Quantities of work or material in excess of those named in the instructions to bidders, and of the same kind, are not to be considered as extra work, and such excess, when ordered by the Engineer, will be paid for at contract rates. Aside from the work thus included in the schedule, no claim whatever for extra work will be considered or paid, except only when ordered in writing by the Engineer at a price stated in the order * * * and when the claim is made in writing before the next monthly estimate and accompanied by the order authorizing its performance * * *. The Engineer's authority to order extra work is expressly limited to $500 on this contract, unless specifically authorized by the Commission of the City of Miami to exceed this amount" (R. 4134).

The testimony is abundant to the effect that the engineer of the respondent increased the quantities of the work and material.

It will be noted that the contracts provide that such added work or material will be paid for, along with the original, at the rates stipulated in the contracts, and that such increased or additional quantities are not to be considered as extra work.

The Circuit Court of Appeals, in holding that the respondent was entitled to judgment as a matter of law on the disputed claims under the unambiguous terms of the contracts sued on, evidently did so because such additional work was not ordered by the engineer of the respondent in writing. The contracts clearly do not require additional quantities of work or material to be ordered in writing, such provision being applicable only to extra work as defined by the contracts and changes in plans and specifica-

tions; and further, the evidence is conclusive that the engineer for the respondent refused to place any of his orders in writing by stating that he was not going to be bothered with giving written orders (R. 475, 486).

In *Wood et al.* v. *City of Fort Wayne,* 119 U. S. 312, 30 L. Ed. 416, the contract contained a provision similar to the one here involved, as follows:

> "The said trustees shall have the right to make any alterations in the extent, dimensions, form or plan of the work contemplated by this contract, either before or after the commencement of construction. If such alterations diminish the quantity of work, the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work, such actual increase to be paid for at contract rate for work of its class."

The defendant pleaded as follows:

> "As to the third paragraph of the complaint, the answer, in its sixth paragraph, avers that all the materials were furnished, and all the labor was performed, under the written contract, at prices specially set forth therein; that the contract price has been fully paid; and that no written order was made by the city engineer and the trustees, directing the plaintiffs to furnish any extra materials or do any extra work."

The Supreme Court of the United States held:

> "We are of opinion that the court erred in its view of the rights of the plaintiffs under the contract. The clause providing that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer and trustees, is an independent clause from that which provides that the trustees shall have the right to make any alterations in the plan of the work, either before or after its commencement; and the extra work referred to in the former clause does not embrace

> work done in pursuance of an alteration made by the trustees in the plan. The latter work may be, in one sense, extra work; but if it results from an alteration of plan by the trustees, and there is, in consequence, an increase in the quantity of work, the actual increase is to be paid for at the 'contract rate for work of its class.' The extra work referred to in the former clause required the authoritative written order of the engineer and trustees; but, as the trustees had the right to alter the plan, work done to carry out such alteration, when made by the trustees, was authorized by the trustees, in a manner equivalent to a written order by them and the engineer."

POINT E.

The decision of said Circuit Court of Appeals, by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely questions of law, so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The trial court withdrew from the consideration of the Jury the above mentioned claims of the petitioner (R. 3988).

The bidding blanks provided for a price to be submitted for grading by the square yard (R. 4127). In order to bid a price for grading on the basis of a square yard, the depth of the grading must be known. Profiles were supplied by the respondent for the purpose of furnishing this information (3010). It was impossible to determine the depth of grading from the profiles because errors existed therein (R. 769). Paragraph 4 of the Instructions to Bidders provided that if any errors were discovered in the plans the same must be brought to the attention of the engineer for the respondent in order that the necessary explanations or corrections might be made (R. 4123). The petitioner

brought to the attention of said engineer the errors in the profiles prior to bidding, and was told by said engineer that the grading or excavation would not exceed, on an average, nine inches over the work as a whole (R. 769, 2297), and a bid was made accordingly. The respondent admits that the grading greatly exceeded an average cut of nine inches, and that petitioner has not been paid for such excess.

The trial court having admitted substantial evidence of the petitioner's claims for such excess grading, it is axiomatic that the trial court should have left said claims for the determination of the Jury.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated this 4th day of June, 1942.

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(10)

SUPREME COURT OF THE UNITED STATES

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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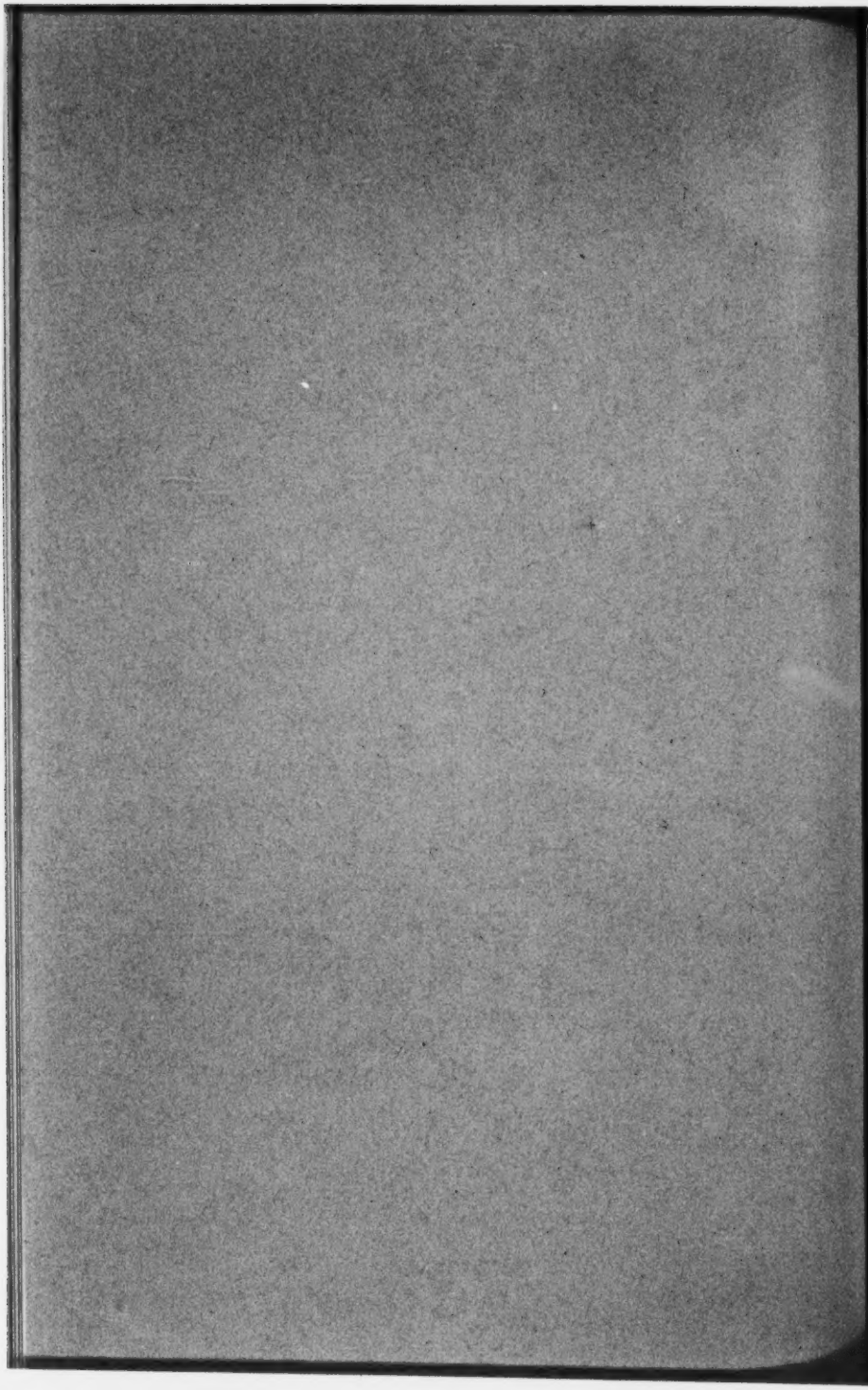

SUBJECT INDEX

AUTHORITIES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,

Petitioner and Plaintiff-Appellant Below

vs.

CITY OF MIAMI, FLORIDA,

Respondent and Defendant-Appellee Below

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

Introductory Statement

The filing herein of the petition for a writ of certiorari marks the fifth attempt by the petitioner to have its contentions and theories with respect to the instant cause approved in a Federal court. Those contentions and theories have already been rejected as illogical and unsound on four different occasions; first, by the Jury in the District Court; secondly, by the Judge in

the District Court when he denied petitioner's motion for a new trial; thirdly, by the Circuit Court of Appeals for the Fifth Circuit when, by unanimous decision, it held that submission to a jury of the matters in dispute had been entirely unnecessary inasmuch as "under the unambiguous terms of the contracts the City (respondent here) was entitled to judgment as a matter of law" (R. 4744); and fourthly, by the Circuit Court of Appeals when it denied the petition for rehearing (R.4778) in which the petitioner presented to the Circuit Court of Appeals every point, without exception, which it now presents to this Court as a basis for the issuance of a writ of certiorari.

There is in reality no Federal question involved in the instant cause, despite petitioner's argument to the contrary under Point C in its brief. The cause was filed in the United States District Court solely because the plaintiff (petitioner here) is an Ohio corporation and the defendant (respondent here) is a Florida municipality. Were there not this diversity of citizenship, the cause would have originated in a local state court and would have eventually been decided by the Supreme Court of Florida (with precisely the same result, we are convinced, as that which has been attained to date in the Federal courts), and in that event, we submit that there would patently be no basis upon which review by this Court could logically have been sought.

Summary Statement of Matter Involved

Although, in general, the petitioner's summary statement of the matter involved herein (petitioner's petition and brief, pages 1-4) is acceptable, there are nevertheless

a few statements therein which, in our opinion, require special comment.

On page 2 of its petition and brief, the petitioner states,

> "The petitioner refused to accept the amount so found to be due by the City Engineer, for the reason that said estimates did not include any compensation for work performed and materials furnished on the order of the City Engineer in excess of the amounts and of the same kind as named in the Instructions to Bidders, and changes in the quantity or cost of work and material, consisting of claims for:" (and then follows a description of each of the kinds of alleged claims upon which the petitioner predicated its suit).

In and by the statement quoted, it is assumed and stated as an established fact that the petitioner did perform work and did furnish materials in excess of the amounts included in the final estimates prepared by the City Engineer,—an assumption and statement in direct conflict with the contentions of the respondent from the very inception of the dispute between the parties. The respondent has consistently maintained that the final estimates prepared by the City Engineer included, without exception, all work and materials for which the petitioner was entitled to payment, that there were no materials furnished or work done for which the petitioner would be entitled to compensation over and above the quantities included in the final estimates, that the total amount still due the petitioner upon the final estimates was $23,263.15,

and that every claim of the petitioner is either based upon its misconception, misconstruction or misinterpretation of specifications or is based upon alleged orders of the City Engineer which were not in fact given or upon purported conditions which did not in fact exist. The petitioner was accorded every opportunity and the fullest latitude by the District Judge to present all of its theories and contentions to the Jury (although counsel for the respondent contended and the Circuit Court of Appeals has now confirmed the soundness of such contention (R. 4744) that the respondent City was entitled to judgment purely as a matter of law). The Jury awarded the petitioner $23,263.15, the precise amount which the respondent had offered to pay to the petitioner immediately after the final estimates were prepared in 1927.

On page 4 of its brief, the petitioner states,

> "The trial was by Jury. There is very little dispute as to matters of fact. The record will disclose that at least 90% of the testimony is nothing more than the opinions of witnesses as to how they think the contracts sued on should be interpreted, and argument between counsel and witnesses concerning such interpretation. The case, in the main, before the Jury was a dispute, not of fact but of interpretation, of the contracts and plans and specifications made a part thereof, which the trial court refused to construe and left the Jury free to put its own interpretation thereon."

This statement requires supplementary comment. While it is generally true that there was very little dispute as

to the quantity of materials used or the amount of work done under the seven paving contracts, yet there were a number of most pertinent conditions and circumstances with respect to the work which were matters of dispute and which were referred to the Jury, such, for example, as whether one or two inlet plans had been furnished to the petitioner, whether the City Engineer did, in fact, issue various kinds of orders, whether the petitioner was informed that local stone could be used, whether specific quarries were pointed out by the City Engineer as quarries from which stone should be procured, whether sewer plans were provided and used while the work was being done, whether the petitioner was compelled by the City Engineer to buy more costly materials from specific vendors, whether certain operating methods were employed by the petitioner voluntarily, and numerous other matters in support of or in refutation of the contentions of the respective parties. All of these matters in dispute were submitted to the Jury and its determination thereof no doubt constituted the basis of its verdict in favor of the respondent.

Jurisdictional Statement

Assuming, but denying, that the reasons relied on by the petitioner for the allowance of the writ of certiorari have merit (petitioner's petition and brief, pages 11-13), the statement of the petitioner as to the jurisdiction of this Court is acceptable.

The Questions Presented to the Circuit Court of Appeals for Decision

The statement of the petitioner as to the principal

questions which were presented to the Circuit Court of Appeals for decision (petitioner's petition and brief, pages 5-11) is sufficiently accurate to be acceptable to the respondent.

Reasons Relied On by Petitioner for Allowance of Writ

Since each of the five reasons relied on by the petitioner for the allowance of the writ is discussed at length under an appropriate point heading in that portion of petitioner's brief devoted to the argument, it will be similarly discussed hereinafter under the same point heading as that employed by the petitioner.

Petitioner's Specification of Errors of Circuit Court of Appeals

Each purported error of the Circuit Court of Appeals, as specified by the petitioner on pages 15-18 of its petition and brief, pertains to and is discussed under an appropriate point heading in that portion of petitioner's brief devoted to the argument; each such purported error will be similarly discussed hereinafter under the same point heading as that employed by the petitioner.

It is to be noted that every such alleged error of the Circuit Court of Appeals, as now specified by the petitioner to this Court, was also specifically cited by the petitioner as a ground for rehearing by the Circuit Court of Appeals (R.4753-4777), was unquestionably accorded the careful thought and consideration of that Court, and found to be lacking in merit (R.4778).

Moreover, it is fitting to invite the Court's attention

here and at this time to what, we submit, is a fundamentally erroneous theory which is reflected by the phraseology of the petitioner's specification of errors allegedly committed by the Circuit Court of Appeals.

That fundamentally erroneous theory upon which the petitioner instituted the instant cause and to which it has persistently adhered and still adheres despite consistently adverse findings and rulings in the District Court and in the Circuit Court of Appeals, is that the work which it allegedly did and the materials which it allegedly furnished, over and above the work and materials included in the final estimates, constituted "additional" work and materials, rather than "extra" work and materials. The development of and adherence to this theory was essential to the petitioner's potential right to initiate and maintain its suit, inasmuch as the contracts under which all work was done and all materials were furnished distinguished between "additional" work and materials and "extra" work and materials, and provided, inter alia, that "no claims whatever for extra work will be considered or paid, except only when ordered in writing by the Engineer at a price stated in the order" (R.4134), and the petitioner being unable to produce any written orders signed by the City Engineer in support of its alleged claims, therefore found it necessary to develop and to build up and to prosecute its entire case upon the theory that its alleged claims pertained to "additional" work and materials and not to "extra" work and materials.

Consequently, the petitioner's "Specification of Errors of Circuit Court of Appeals" is phrased throughout in language reflecting such theory,--a theory which the Jury

by its verdict rejected, which the District Judge refused to accept, and which the Circuit Court of Appeals recognized as fallacious when it stated in its opinion, "The Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work" (R.4742).

Petitioner's Point A

The first of the five reasons on which the petitioner relies for the allowance of the writ of certiorari (petitioner's petition and brief, pages 11-12 and 19-20) is that the decision of the Circuit Court of Appeals in holding that the trial court's refusal to interpret to the Jury the unambiguous provisions of the contracts sued on was harmless error, so far departs from the accepted course of judicial proceedings, or so far sanctions such a departure by the lower court, as to call for an exercise of supervisory power by this Court.

We do not deny the existence of the general rule of law that it is the duty of the court to construe unambiguous contractual provisions, but we do deny that the Circuit Court of Appeals neglected to perform such duty in the instant cause.

The petitioner, in support of its point under discussion, cites the case of *City of Orlando, Florida* v. *Murphy*, 84 F. (2d) 531. It is well to note that participating in the decision thereof were Judges Sibley and Holmes, two of the three Circuit Court Judges who held in the instant cause that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law"

(R.4744). Certainly there is no expression in the opinion filed in the instant cause which would suggest that Judges Sibley and Holmes had performed their judicial duties herein in a manner inconsistent with what they had declared the duty of the court to be in the *Orlando* case.

On the other hand, although the Circuit Court of Appeals did state in the instant cause that the District Court had "declined to construe and pass upon the different sections of the contracts, except in one or two instances", the Circuit Court of Appeals by no means approved the neglect of the trial court to perform its duty in this respect, declaring instead that "the (District) court should have decided what portions of the contract, if any, were doubtful, and should have ruled out all oral conversations, promises, or corrections, except what was truly an explanation of a doubtful expression in the writings" (R. 4742).

Of course, a complete answer to the petitioner's argument in support of its Point A is that the Circuit Court of Appeals itself performed the duty which it found that the District Court had not fully performed, that is, it construed, interpreted and passed upon the pertinent sections of the contracts and, having done so, concluded that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law" (R.4744).

That the Circuit Court of Appeals did in fact construe and pass upon the controlling provisions of the contracts is irrefutably established by its opinion filed herein (R. 4737-4745). In that opinion there is quoted at length

excerpts from six different numbered sections of the contracts and also a complete section of the City Charter prescribing the conditions which must be observed when contracts for public work are altered or modified. Immediately following these quotations, the Circuit Court of Appeals stated (R.4741-4742):

> "If we but follow the clear and unambiguous terms of the seven contracts, and strip away the long and tedious pleadings, the issues become patent and are in no wise confusing."
>
> * * * * * * * * *
>
> "The provisions of the Charter of the City of Miami, the instructions to bidders, and the express terms of the several contracts make it exceedingly clear that the parties intended, agreed, and understood that their contracts were to be fully written. The contracts as written were not subject to change, contradiction, or variation by parol evidence. Therefore, the voluminous evidence as to what transpired between the parties before the contracts were signed was immaterial." (Citing authorities)

And the subsequent portions of the Court's opinion are likewise replete with references to specific provisions of the contracts and to the legal effect of such provisions,—conclusive evidence that, irrespective of what the District Court may or may not have done, the Circuit Court of Appeals cured such deficiency, if any, and fully discharged

any judicial obligation which may have prevailed to construe and rule upon relevant sections of the contracts.

It follows that the first of the five reasons relied upon by the petitioner for the allowance of the writ is wholly without merit.

Petitioner's Point B

The second of the five reasons on which the petitioner relies for the allowance of the writ (petitioner's petition and brief, pages 12 and 20-24) is that the decision of the Circuit Court of Appeals, by "holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner, in the absence of bad faith, fraud or deceit of the engineer (R.4744), is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and is a decision also in conflict with the decision of the Circuit Court of Appeals for the First Circuit on substantially the same matter."

The decision of the Circuit Court of Appeals for the First Circuit with which the decision in the instant cause is alleged by the petitioner to be in conflict, was rendered in the case of *Gammino* v. *Inhabitants of the Town of Dedham*, 164 F. 593.

That case was cited by the petitioner on page 328 of the brief which it filed, as appellant, in the Circuit Court of Appeals; it was again cited by the petitioner in its petition for rehearing (R.4769) filed in that Court; wherefore,

it is reasonable to presume that the *Gammino* case having been brought specifically to their attention on at least two different occasions by the petitioner, the Circuit Court of Appeals Judges in deciding the instant cause must have given proper consideration to the cited case and must have been of the opinion that the decision therein was not in conflict with their decision here.

And indeed, an examination of the opinion in the *Gammino* case discloses immediately that the factual situation and the contract provisions therein are entirely different from those controlling in the instant cause.

In the *Gammino* case, prices had been secured and a contract awarded upon an estimated proportion of rock and earth excavation, with a 25 per cent margin of variation, for two described sewer improvements. In the prosecution of the work, it was found that the quantity of rock to be excavated was appreciably more and the quantity of earth correspondingly less than the estimate upon which prices had been obtained, although the total quantity of work to be done, namely, the completion of the two described sewer improvements, was unchanged.

The question before the Circuit Court of Appeals for the First Circuit in the *Gammino* case, therefore, was whether the contractor should be restricted to the contract price predicated upon an erroneous estimate made by the Town of Dedham prior to the submission of bids. The Court held that the contract price governed only to the extent covered by the estimates upon which bids were prepared, with a 25 per cent margin for variation, and that "it was the intention of the parties, in case the

quantities exceeded the estimates by more than 25 per cent, that the contractor might claim on quantum meruit for the balance".

Certainly there has been no similar question raised or decided in the instant cause, and therefore the only conceivable basis for the assertion by the petitioner that the decision herein conflicts with that rendered in the *Gammino* case is the inclusion in the opinion filed in the latter case of the statement quoted on page 21 of petitioner's brief. But that statement appears at the very end of the lengthy opinion in which the Court has discussed the admissibility of oral testimony varying the terms of a written instrument, the admissibility of evidence relating to customs and usages, and a number of other matters not affecting its decision. The statement relied upon by the petitioner as establishing a conflict between decisions of two Circuit Courts of Appeals was obviously dictum, a mere comment by the Court upon the following provision of the contract involved:

> "In case of any dispute arising the engineer shall have the right to settle the same, and he shall have the right to determine and interpret the meaning of these specifications and contract to be made under them, and all decisions of the engineer shall be final."

There is nothing in the opinion of the Court in the *Gammino* case which would indicate that the charter of the Town of Dedham or the contract under consideration contained restrictive provisions with respect to alterations or modifications in the work to be done at all comparable

with those in the Charter of the City of Miami and in the contracts involved in the instant cause and quoted by the Circuit Court of Appeals (R. 4739-4741). We submit, therefore, that the assertion of the petitioner that the decision of the Circuit Court of Appeals herein is in conflict with the decision in the *Gammino* case, is wholly without merit.

Under its Point B, the petitioner also asserts that the decision of the Circuit Court of Appeals herein "is a decision of an important question of local law in a way probably in conflict with applicable local decisions", and relies upon the decision of the Supreme Court of Florida in the case of *Duval County* v. *Charleston Engineering & Contracting Co.*, 101 Fla. 810, 134 So. 509. That case was also cited by the Circuit Court of Appeals (along with three other cases decided by the Supreme Court of the United States, which the petitioner in its brief neglects to discuss) as authority for its holding that under the provisions of the contracts relating to the functions, duties and powers of the City Engineer, to all of which provisions the petitioner had agreed when it signed the contracts, the "decision of the engineer was to be binding upon the parties, and where, as here, the contractor violated the terms of the contract, and made no attempt to show that the engineer, the City, or its agent were guilty of bad faith, fraud, or deceit, it may not recover" (R. 4744). And then there immediately follows the statement by the Court that "on the facts now shown we are of opinion that under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law" (R.4744).

In support of its contention that the Circuit Court of

Appeals decided an important question of local law in a way probably in conflict with local decisions, the petitioner reiterates that there was very little dispute as to the facts. Our comments upon a similar assertion by the petitioner have already been set forth hereinbefore in the summary statement of matter involved, and consequently need not be stated again.

Despite petitioner's insistence to the contrary, the case of *Duval County* v. *Charleston Engineering & Contracting Co., supra*, cited by the Circuit Court of Appeals herein, does beyond question fully support the decision of that Court that under the specific provisions of the contracts, the final estimates of the City Engineer would be binding upon both parties, in the absence of a showing of bad faith, fraud or deceit,—a showing which the petitioner has never undertaken to make herein. For in the *Duval County* v. *Charleston Engineering & Contracting Co.* case, the Supreme Court of Florida stated,—

> "Where the contract contains provisions referring the estimate of the quantity and quality of the work absolutely to the determination of the Company's Engineer, or any particular party, and provides that his decision shall be final, no relief from his decision can ordinarily be obtained even in a Court of Equity, unless upon the ground of partiality or obvious mistake." (134 So. 515)

And likewise in the head-note prepared by the State Supreme Court, the Court stated,—

> "Whilst an engineer's certificate required by a

> construction contract to show the amount and quality of work done as a condition to payment will not be regarded as conclusive and unassailable in all cases, yet it will be, without fraud or special showing."

The petitioner further contends that the authorities cited by the Circuit Court of Appeals are inapplicable in the instant cause because the respondent, by way of pleading in defense after petitioner instituted this cause, filed a counterclaim which it later abandoned, the contention of the petitioner being that by filing the counterclaim the respondent "completely abandoned that provision of the contracts upon which the Court of Appeals' decision is grounded" (petitioner's brief, page 23). And in support of this novel contention, the petitioner cites two Florida cases, *Campbell et al.* v. *Kauffman Milling Co.*, 42 Fla. 328, 29 So. 435, and *Mizell Live Stock Co.* v. *McCaskill Co.*, 62 Fla. 239, 56 So. 391. In each of those two cases, the Supreme Court of Florida merely declared that a plaintiff can not prosecute two inconsistent suits covering the same right of action, but must make an election, and there is not one word in the opinion of either case which would suggest that the Supreme Court of Florida meant thereby that it would deny to a defendant the legal right to abandon a plea during the progress of litigation under penalty of being adjudged thereby of having repudiated the provisions of a contract under seal. That the petitioner attached no significance to the abandonment of a defensive counterclaim by the respondent is established by the fact that by affirmative action taken by the petitioner itself (R. 2, items 7 and 11), the counterclaim was excluded from the printed record.

It is clear that the second of the five reasons relied upon by the petitioner for the allowance of the writ also lacks merit.

Petitioner's Point C

The third of the five reasons on which the petitioner relies for the allowance of the writ (petitioner's petition and brief, pages 12-13 and 25-27) is that "the decision of said Circuit Court of Appeals, by affirming the action of the trial court in asking the Jury, after they had deliberated and reported that they were hopelessly 'tied up' to where they could reach no decision (R.4092), how they were numerically divided (R.4093), and by holding that the error was lost to the petitioner, because of its failure to object or except to such action of the trial court (R. 4744), is a decision of an important Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States."

In support of its Point C, the petitioner cites two cases, *Brasfield* v. *United States*, 272 U. S. 488, and *St. Louis & S. F. R. Co.* v. *Bishard*, 147 Fed. 496, the first named being a criminal case, and in the second named case, a civil case, the Court points that an exception was preserved by the company to the action of the lower court in asking the jury how it was divided. Thus, neither case cited by the petitioner is in point here, since the instant cause is not a criminal case and no objection of any kind was made by the petitioner when the questioning of the Jury took place.

Moreover, there is no reason to believe that the verdict

of the Jury was influenced in any way by the District Judge's question as to how the Jury stood or by his remarks urging the Jury to endeavor to reach a verdict. In addition to such remarks, and at the request of two members of the Jury (apparently the same two who, until then, were not in accord with the others upon some of the counts), the District Judge read at length from charges which he had given theretofore (R.4099-4112) upon the consideration to be given to action taken by the City Commission or to findings made by the Auditor, and also upon the subject of interest. The statement by the Judge urging the Jury to endeavor to reach a verdict covers but one-half page in the printed record (R.4098); the charges which were reread immediately thereafter cover 12 pages (R.4099-4112). Certainly it is reasonable and logical to conclude that the verdict of the Jury was influenced by the further charges given at the request of the two jurors, rather than by the statement of the Judge that the Jury should endeavor to reach a verdict. And that the petitioner attached no significance whatsoever to the Judge's statement that the Jury should endeavor to reach a verdict is disclosed by the fact that its counsel made no protest of any kind with respect to such statement during the 2 hours and 20 minutes which intervened between the Judge's question as to the numerical division of the Jury and the publication of the verdict (R.4092 and R.4115), although counsel did object to the Court's recharge upon the subject of interest (R.4112). The fact that counsel objected to the recharge with respect to interest but failed to make any reference (although there was more than 2 hours time within which to do so) to the Judge's remarks relative to the desirability of reaching a verdict establishes

conclusively that counsel did not consider such remarks detrimental in any respect to the interests of his client, and that he raised the question only because he later learned that the language employed by this Court in the *Brasfield* case could probably be employed to his client's advantage.

But in the final analysis, it becomes wholly immaterial whether the Circuit Court of Appeals was or was not in error in stating that the petitioner had lost its right to object by failing to interpose a timely objection when the trial court asked the Jury how it was numerically divided. For, as the respondent has consistently contended, and as the Circuit Court of Appeals has now unequivocally decided and declared, "the City was entitled to judgment as a matter of law" (R.4744); wherefore, the case should have never reached the stage where it was submitted to a jury for consideration, and so, whether the District Judge was or was not in error in asking the Jury how it was numerically divided becomes a purely academic question.

Petitioner's Point D

The fourth of the five reasons on which the petitioner relies for the allowance of the writ (petitioner's petition and brief, pages 13 and 27-30) is that the "decision of said Circuit Court of Appeals, by holding that the respondent was entitled to judgment as a matter of law on the disputed claims of the petitioner under the unambiguous terms of the contracts sued on by petitioner (R.4744), so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of

supervision of the Supreme Court of the United States."

In its Point A, the petitioner asserts that unambiguous contractual provisions should have been, but were not, construed by the courts. And now in its Point D, it admits that such contractual provisions were in fact construed by the Circuit Court of Appeals but complains because the construction so undertaken and given by that Court led to the legal conclusion that the respondent was entitled to judgment herein purely as a matter of law.

The petitioner's entire argument in support of its Point D is predicated upon its fundamentally erroneous theory that its alleged claims relate to "additional" work and materials and not to "extra" work and materials.

We have discussed this fundamentally erroneous theory of the petitioner, and the reason therefor, hereinbefore in that portion hereof devoted to the petitioner's specification of errors of the Circuit Court of Appeals. We invite the attention of this Court to that discussion.

That the alleged claims of the petitioner were in reality for "extra" work and materials, as defined in the contracts, and not for "additional" work and materials, as also defined in the contracts, is well established by the evidence (R.3428-3431).

The petitioner cites, in support of its Point D, the case of *Wood et al.* v. *City of Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416. But that case relates to work that was done in compliance with and after specific authorization by trustees, in accordance with the provisions of the contract involved. In the instant cause, however, as the Cir-

cuit Court of Appeals (after remarking that "the Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work" (R.4742) found and stated, "the alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged additional work was done and materials furnished" (R.4743) as required by Section 54 of the City Charter. The case cited by the petitioner is not in point.

It is to be noted that in support of its Point D, the petitioner quotes excerpts only from paragraphs numbered 6, 7 and 9 in the contracts, and wholly fails and neglects to give any consideration to the equally controlling provisions of Section 54 of the Charter of the City of Miami and of paragraphs numbered 4, 5 and 13 in the contracts, charter and contract provisions cited by the Circuit Court of Appeals in its opinion (R.4739-4741) and which fully establish the soundness and correctness of the Court's decision that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law", a decision rendered after the Jury in the District Court had decided by its verdict that the City was entitled to judgment based upon the facts as well.

We submit that the fourth reason upon which the petitioner is relying for the issuance of the writ lacks merit.

Petitioner's Point E

The fifth and last of the reasons on which the petitioner relies for the allowance of the writ (petitioner's

petition and brief, pages 13 and 30-31) is that "the decision of said Circuit Court of Appeals, by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely questions of law, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States."

If the decision of the Circuit Court of Appeals that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law on the disputed claims" is sound, it follows that petitioner's Point E is devoid of merit. For the alleged claims of the petitioner relating to grading are included among the "disputed claims" to which the Circuit Court of Appeals has referred, the only difference between the treatment accorded the alleged claims for grading and the treatment accorded the remaining "disputed claims" being that the District Court ruled out the grading claims "as a matter of law", whereas the remaining "disputed claims", although they also should have been ruled out by the District Judge upon legal grounds alone instead of being submitted to the Jury (which promptly rejected them), were ruled out "as a matter of law" by the Circuit Court of Appeals.

On page 31 of its brief, petitioner states,

> "The trial court having admitted substantial evidence of the petitioner's claims for such *excess* grading, it is axiomatic that the trial court should

have left said claims for the determination of the Jury."

(Parenthetically, we note that the petitioner refers to its claims as "claims for such *excess* grading", and likewise on page 18 of its brief, also describes its claims as being for *excess* grading,—proof that even the petitioner recognizes and, in unguarded moments, admits that its alleged claims relate to "extra" work and materials and not to "additional" work and materials.)

Of course, it is not "axiomatic that the trial court should have left said claims for the determination of the Jury".

The District Judge determined, and the Judges of the Circuit Court of Appeals have unanimously approved and confirmed such determination, that the City was entitled to judgment on these claims for alleged additional grading (in reality, claims for alleged "extra" grading) purely as a matter of law. If the District Judge had made such determination before the submission of evidence, it follows that no evidence would have been permitted. The error of the District Judge, if there was an error, was in allowing evidence to be submitted with respect to the claims in the first instance, not in withdrawing the claims from the consideration of the Jury. It is quite probable, however, that it was by hearing the evidence with respect to these claims that the District Judge became convinced that the claims were predicated upon theories and contentions wholly repugnant to the express provisions of the written contracts and that he at that time first realized that there was nothing to submit to the consideration of

the Jury, the City being entitled to judgment, as it had contended from the very inception of the case, purely as a matter of law.

For the reasons given by the District Judge when he withdrew the alleged claims for grading from the consideration of the Jury (R.3988-3989), we submit that his action was legally sound and that consequently the Circuit Court of Appeals did not err when it affirmed such action.

Concluding Statement

There is one portion of the opinion of the Circuit Court of Appeals which we believe it is appropriate for us to quote herein so that this Court may in a small measure apprehend the type of experience which the respondent City has had in its dealings with the petitioner. In the language of the Circuit Court of Appeals (R.4743):

> "It is further without dispute that as the work progressed under the seven contracts the engineer made monthly estimates of work done and materials furnished, and the Construction Company was paid ninety per cent of his estimates. For more than six months the Construction Company each month received this ninety per cent payment for work done, materials furnished, and extra work. Its officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large additional claims. Under the theory now presented, the contractor

held back each month claims in excess of $50,000.00 and accepted ninety per cent of the money on estimates of the engineer for work, materials, and extras, and this in the very teeth of the contracts which provide that claims be made known on or before the 25th of each month—the engineer's estimate day. This conduct of the Construction Company does not add up to open and fair dealings."

Should the petition for the writ of certiorari be granted, it would then become necessary for this Court to make an intensive study and analysis of thousands of pages of testimony and of voluminous exhibits and, upon the completion thereof, if the petitioner is to benefit from the allowance of the writ, to find numerous facts in direct conflict with those found by the Jury in the District Court, and to apply principles of law repugnant to those found by the District Judge and by three Judges of the Circuit Court of Appeals to be controlling herein.

It is to be borne in mind that the Jury reached its verdict only after many weeks of consideration of the facts herein. The trial before the Jury began on March 4, 1940 (R.353); the verdict of the Jury was not reached until more than three months later, on June 13, 1940 (R.4517). The verdict therefore represents most careful and profound thought and consideration by the Jury of every theory and contention which the petitioner was accorded every opportunity to present. Dissatisfied with the findings on one jury, the petitioner now asks this Court to set aside such findings and to require another jury to devote many additional weeks to consideration of the

same theories and the same contentions, hoping thereby to impress a second jury where it had failed utterly to impress the first. We submit that it is axiomatic that jury findings, made under the conditions which prevailed in the instant cause, are not set aside by appellate courts.

The Jury found that, based upon the facts, the petitioner is entitled to receive $23,263.15, the precise amount which the respondent offered to pay to the petitioner fifteen years ago; the District Judge approved the findings of the Jury and also found $23,263.15 to be the total amount to which the petitioner is legally entitled; three Judges of the Circuit Court of Appeals likewise decided unanimously that the petitioner's recovery herein should be $23,263.15, plus interest thereon, not solely because of the findings made by the Jury but also and primarily as a matter of law.

We submit that it is conclusively established that justice has been done, that the findings of fact by the Jury and the conclusions and applications of law by the District Judge and by the three Judges of the Circuit Court of Appeals should not be disturbed, and that consequently the petition for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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Miami, Florida

(11)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

William H. Boyd,
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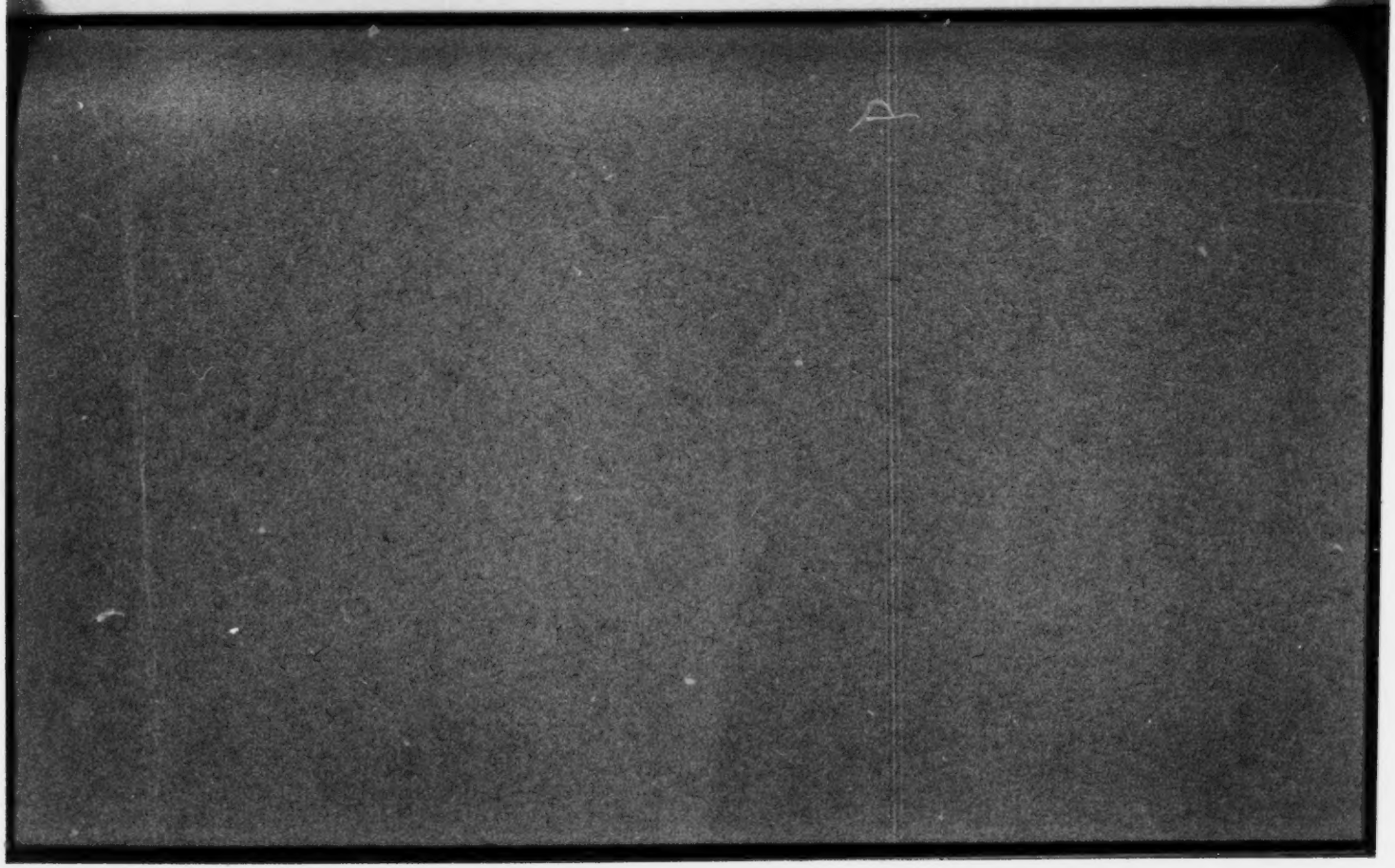

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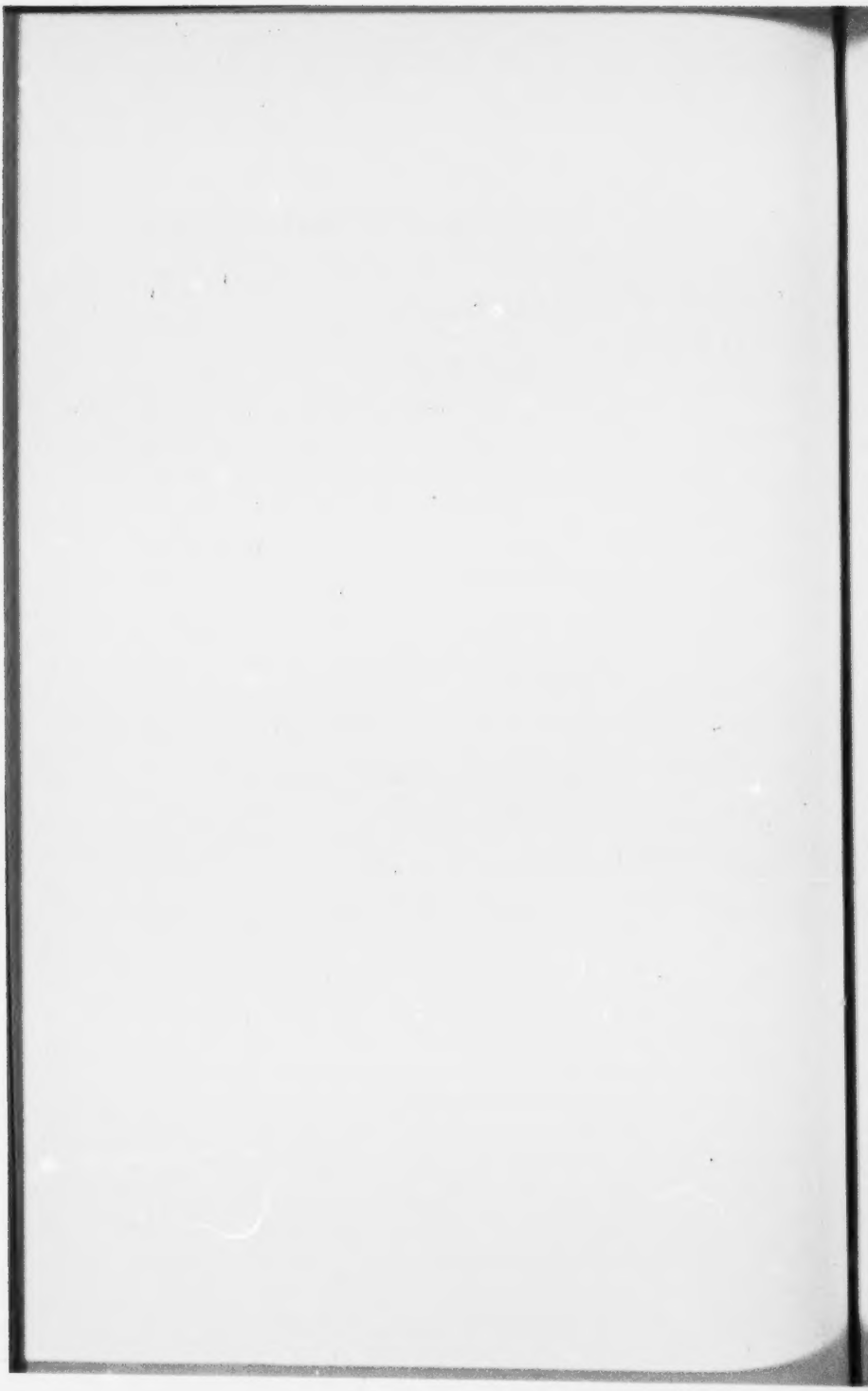

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It is the purpose herein to reply briefly to a few points raised in the brief of Respondent.

In the Respondent's opening statement, page 2, it contends that really no federal question is involved, for the reason that this cause was filed in the United States District Court solely because of diversity of citizenship. Granted that such was the ground for the cause being field in the Federal Court, this does not preclude the federal questions now involved.

The Respondent admits (pages 4 & 5) that there was very little dispute as to the quantity of materials used and work done under the seven contracts, but states, on page 7, that the claims of the Petitioner relate to "extra" work and materials, not to "additional" work and materials, and further, that such fact is well established by the evidence, citing, on page 20, as the establishment of this fact pages 3428 to 3431 of the record. Inspection of this reference discloses that the City Engineer, who prepared the final estimates, stated on direct examination that all of the claims of the Petitioner were for "extra" work under his interpretation of the contract.

The primary and main point at issue in this cause is for the recovery of additional work done and additional material furnished by the Petitioner upon the order of the Respondent, and that such additional work was contemplated and provided for by the express terms of the contract. Paragraph 9 of the contract (R. 4134) provides for the furnishing of excess or additional work and materials, and provides for the payment therefor as follows:

> "Quantities of work or materials in excess of those named in the instructions to bidders and of the same kind, are not to be considered as extra work, and such excess, when ordered by the Engineer, will be paid for at contract rates, as hereinbefore specified."

An examination of the opinion of the Circuit Court of Appeals (R. 4738 to 4748) shows that it cited Section 54 of the charter of the City of Miami, together with paragraphs 4, 5, 6, 7, 9 and 13 of the contracts. The opinion then states that "the contracts were not subject to change, contra-

diction, or variation by parol evidence." Of the twelve claims involved, only two were in any way dependent on parol evidence, nor was any change, contradiction, or variation of the contracts as written, involved. Reference is made to paragraph 7, page 16, of Petitioner's brief, where it is shown that Section 54 of the charter of the City of Miami does not in any way affect or have any bearing upon the points at issue in the instant case.

The Circuit Court of Appeals, in the instant case, stated that:

> "The Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work; that the work was done and the materials furnished and was accepted by the City; and that the City waived the conditions of the contracts. * * * the alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged additional work was done and materials furnished. Under the facts shown there was no waiver of the requirements of the contracts." (R. 4742)

The Circuit Court of Appeals gave no reason or explanation to support its criticism of the Petitioner, that it sought to escape the terms of the written contracts by alleging that its claims were for additional work. Said Court apparently proceeded on the basis that there were no provisions in the contracts for the performance of additional work, notwithstanding it had cited paragraph 9 of the contracts, which expressly provides for excess work. There is, of course, no difference between "work or materials in excess of those named in the instructions

to bidders and of the same kind" and "additional work and materials." The phrase "additional work and materials" was obviously used by the Petitioner as a short expression for "work or materials in excess of those named in the instructions to bidders and of the same kind."

Said Court further stated, in its opinion as quoted above, that:

> "The alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged work was done and material furnished."

The contracts did not provide that quantities of work or materials in excess of those named in the instructions to bidders, and of the same kind, which in reality is additional work, must be ordered in writing, or that the Respondent would order such excess or additional work in writing.

Some of the Petitioner's claims, such as claims for additional depth of inlets (R. 524) and catch basins (R. 554), did not depend upon any changes in the plans or specifications to support them, it being provided in paragraph 8 of the specifications for inlets and catch basins (R. 4184) that such structures should be built as shown on the plans or "as the Engineer (meaning the City Engineer) may direct." The claims of the Petitioner for additional depth of sewer pipe (R. 615), where the specifications, under paragraph 4 of the sewer specifications (R. 4182), provide that "excavation will be any depth authorized by the Engineer," did not involve any change in the plans or

specifications; hence, the provision in the contract, providing that changes in the plans and specifications would be given in writing, had no application to such claims. Again, the claims of the Petitioner for grading the area occupied by the curb and gutter, are provided for in the specifications for concrete curb and gutter (Par. 5, R. 4177); hence, it cannot be logically contended that a written order was required under the provision in the contracts that where changes in the plans and specifications were ordered, the Respondent would give such order in writing. The statement of the Circuit Court of Appeals that "it is not shown that the City Manager or the City Commission ever knew that the alleged additional work was done and materials furnished" has no application to the above classes of claims, because no change in the plans and specifications was involved. The claims originated, not by any change of plans or specificaitons, but from the orders of the City Engineer directing the excess or additional work under specific provisions of the specifications.

The opinion of the Circuit Court of Appeals also states:

> "It is further without dispute that as the work progressed under the seven contracts the Engineer made monthly estimates of work done and materials furnished, and the Construction Company was paid ninety per cent of his estimates. For more than six months the Construction Company each month received this ninety per cent payment for work done, materials furnished, and extra work. Its officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large ad-

> ditional claims. Under the theory now presented, the contractor held back each month claims in excess of $50,000.00 and accepted ninety per cent of the money on estimates of the engineer for work, materials, and extras, and this in the very teeth of the contracts which provide that claims be made known on or before the 25th day of each month—the engineer's estimate day. The conduct by the Construction Company does not add up to open and fair dealing."

The above, quoted from the opinion, is merely to show the inconsistency of the opinion with the evidence, for on page 16 of Petitioner's brief will be found 19 separate references to the record, showing that requests were made for the payment of additional work in the partial estimates at the very beginning of the construction, and that Respondent admits some of such requests.

Following the quotation last above mentioned, the Court proceeds to hold that "under the unambiguous terms of the contract, the City was entitled to a judgment as a matter of law on the disputed claims." In the face of inconsistency between statements in the opinion and the undisputed evidence, together with statements not supported by the evidence, and in the absence of any particular application of any interpretation of paragraph 7 or paragraph 9 of the contract, and the classification of all the claims as "extra" work, it would seem that this inconsistency with the evidence, and this erroneous omission, together with its consequent erroneous conclusion, based upon the theory that extra work only was involved, leaves the concluding finding "that the City was entitled to a judgment as a matter of law" without foundation.

POINT A

The Respondent argued that a complete answer to the Petitioner's argument in support of its Point A (which is that the decision of the Circuit Court of Appeals, by holding that the trial court's refusal to interpret to the jury the unambiguous provisions of the contracts sued on was harmless error, departed from the accepted and usual course of judicial proceedings) is that the Circuit Court of Appeals performed the duty which it found the District Court had not fully performed when it held that, under the unambiguous terms of the contracts, the City was entitled to judgment on the disputed claims as a matter of law.

The Respondent argued, in other words, that because the Circuit Court of Appeals held that the Respondent was entitled, as a matter of law, to judgment on the disputed claims under the unambiguous terms of the contracts, such precludes Point A, whether such holding of the Circuit Court of Appeals is a departure from the accepted and usual course of judicial proceedings or not. The infirmity of Respondent's argument in this respect is obvious. The Respondent's argument is based upon an assumption that such holding of the Circuit Court of Appeals was not a departure from the accepted and usual course of judicial proceedings.

POINT B

The Respondent argued, with respect to Point B, contained in Petitioners brief, that the case of *Gammino vs. Town of Dedham*, 164 F. 593, decided by the Circuit Court of Appeals for the First Circuit, is not in conflict with

the decision of the Circuit Court of Appeals in the instant case, because the facts and contract involved in the *Gammino case* were different from the facts and contracts in the instant case.

It is very seldom, in the field of adjudicated cases, that one finds a case where the facts are exactly like the case he is working on; but the question is not whether the facts are exactly the same, but whether they are substantially the same, and whether the principle applied is applicable to the instant case.

The Petitioner contended, in its brief, that the decision of the Circuit Court of Appeals, in the instant case holding that the final estimates of the Respondent were final and conclusive, is in conflict with applicable local decisions, and in conflict with the Circuit Court of Appeals for the First Circuit on substantially the same matter.

The Respondent also argued that the statement of the Court, in the *Gammino case,* relied upon by the Petitioner as establishing a conflict between the decisions of two Circuit Courts of Appeals, was obviously dictum, a mere comment by the Court upon a provision in the contract providing that,

> "In case of any dispute arising, the engineer shall have the right to settle the same, and he shall have the right to determine and interpret the meaning of these specifications and contract to be made under them, and all decisions of the engineer shall be final."

It is obvious that the Petitioner did not rely upon a "mere comment" to establish a conflict between the decisions of the Circuit Courts of Appeals for the Fifth and

First Circuits, as will be seen from an examination of the *Gammino case,* supra.

The Respondent further argued that there is nothing in the opinion of the Court in the *Gammino case* which would indicate that the charter of the Town of Dedham was at all comparable with the charter of the City of Miami, and we respectfully submit, as set forth on page 17 of Petitioner's brief, that said Section 54 of the charter of the City of Miami, even though quoted by the Circuit Court of Appeals in its decision, does not in any way bear upon nor affect the claims involved in the instant case.

The Respondent, in further argument on Point B, refers to the *Duval County v. Charleston Engineering & Construction Company case,* 101 Fla. 341, 134 So. 509, and cites from the decision of the Circuit Court of Appeals in the instant case as follows:

> "Decision of the engineer was binding upon the parties and where, as here, the contractor violated the terms of the contract and made no attempt to show that the Engineer, the City, or its agent, were guilty of bad faith, fraud, or deceit, it may not recover."

The Petitioner submits that the question of "bad faith, fraud or deceit" on the part of the Respondent has nothing to do with the claims of the Petitioner. Most of the Petitioner's claims depend on contract construction, and not on whether the City Engineer acted in bad or good faith when he prepared the final estimates. The City Engineer obviously proceeded to make his final estimates based upon his construction of the contracts, and not upon his

measurements of the amount of work done or materials furnished. The record is wholly devoid of any evidence, or contention on the part of the Respondent, that the Petitioner "violated the terms of the contract," as stated by the Circuit Court of Appeals.

The Petitioner, in its original brief herein, cited from the decision of the Supreme Court of Florida in *Duval County v. Charleston Engineering & Construction Co., supra,* in which the local court held that:

> "Final estimates may not be given conclusive effect as a final settlement of disputes arising under the contract, which disputes are legal in nature and depend upon construction of the terms of the contract * * * for settlement."

Which decision was predicated upon a provision in the contract to the effect that the County Engineer shall decide all questions and disputes which may arise as to the interpretation of the plans, character, quality, amount and value of any work, and his decisions shall be final and conclusive. It would appear that the Florida Court, in said case, followed the logic of the decision of the Circuit Court of Appeals of the First Circuit in *Gammino v. Town of Dedham, supra,* which decided, under a similar provision contained in a construction contract, that such provision

> "cannot be interpreted so as to deprive the parties of their right to a judicial construction of the contract."

POINT C

The Respondent attempts to meet the argument of the Petitioner on Point C (which is that the Circuit Court of Appeals, by affirming the action of the District Court in asking the jury, after it had deliberated and reported that it was "hopelessly tied up," how it was numerically divided, decided an important federal question in conflict with applicable decisions of the Supreme Court of the United States) by stating that *Brasfield v. United States*, 272 U.S. 448, 71 L.Ed. 345, and *St. Louis & S.F.R.Co. v. Bishard*, 147 F. 496, are not in point. The Circuit Court of Appeals of the Fifth Circuit, in the instant case, does not agree with the Respondent that such cases are not in point, but decided that the error was lost to the Petitioner because of its failure to object to the action of the trial court (R.4747). Our position is, as we tried to make it clear in our original brief, that no objection was necessary, because such action of the trial court affected its proper relations to the jury, and that no objection was necessary under the rule as it existed prior to the adoption of the new "Rules of Civil Procedure," and that no objection was necessary under the new "Rules of Civil Procedure." The Circuit Court of Appeals, in the instant case, it will be noted, held that under Rule 46 of said New Rules (which sought to abolish exceptions and liberalize objections) an objection was necessary predicate to putting "the trial court in error."

POINT D

The Respondent argued, in response to Point D (which is that the Circuit Court of Appeals, in holding that the Respondent was entitled to judgment as a matter of law

on the disputed claims under the unambiguous terms of the contracts, departed from the accepted and usual course of judicial proceedings), that the Petitioner, in its treatment of its Point A, asserted that unambiguous contractual provisions should have been, but were not, construed by the courts, and that now, in its Point D, it admits that such contractual provisions were in fact construed by the Circuit Court of Appeals. We think the Respondent missed the Petitioner's Point A. The Petitioner did not argue therein that the Circuit Court of Appeals did not undertake to pass upon contractual provisions, but its argument was that the Circuit Court of Appeals, by holding that the District Court's refusal to interpret to the jury the unambiguous provisions of the contracts sued on was harmless error, departed from the accepted and usual course of judicial proceedings. We submit that the Respondent's remaining argument, in reply to Point D, to the effect that the Petitioner's claims were for extra work and materials and not for additional work and materials, and that Petitioner has failed to give any consideration to Section 54 of the City charter and paragraphs 4, 5 and 13 of the contracts, has been fully answered in another part of this brief.

POINT E

The Respondent argued, with respect to Point E (which is that the decision of the Circuit Court of Appeals by affirming the action of the District Court, in withdrawing from the jury the claims of the petitioner for additional grading, departed from the accepted and usual course of judicial proceedings), that if the decision of the Circuit Court of Appeals, holding that under the unambiguous terms of the contracts the Respondent was entitled to

judgment as a matter of law on the dispuated claims, is sound, it follows that Petitioner's Point E is devoid of merit.

It may be assumed that if the District Court properly withdrew from the jury the claims of the Petitioner for excess or additional grading, the point falls; but the essential question is: Did the District Court properly withdraw such claims from the consideration of the jury? We undertook to show, in our original brief, that the Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings when it affirmed the action of the District Court in withdrawing such claims from the consideration of the Jury.

The Respondent also argued that inasmuch as the Petitioner refers to its claims as claims for "excess grading," that even the Petitioner recognizes that its claims relate to "extra work and material" and not to "additional work and material." This seems to us only a play upon words, a quibble. It is obvious that the words "excess" and "additional" were chosen by the Petitioner as interchangeable terms of short expressions for "work or material in excess of those named in the instructions to bidders and for the same kind." The essential nature of the claims determines their character.

Respondent refers to the reasons given by the District Judge in withdrawing claims for additional grading from the consideration of the jury, and submits that such action was legally sound and furnishes a reference (R.3988). Quoting from this reference (charge of the District Court):

> "Fully cognizant I am that the Plaintiff contends that there were errors in the blueprints, but I have

> regarded the plans and specifications together, and also the form of proposal, and how the bid was made; and I concluded that within reason the substantial variance by including a third dimension, was contradictory of the specifications and plans as a whole. Without that predicate there could be no recovery, by the plaintiff, on this claim; and for that predicate to be considered favorable to the plaintiff, the addition of the provision for the nine-inch depth would not have supplied any ommission,—would not have explained a doubt or obscurity in the specifications, reasonably interpreted, as a whole in connection with other provisions, but would have been directly contrary to the provisions of the contract, as I have explained."

It is true, and Petitioner agrees with the Court, that the provisions for the 9-inch depth would not have supplied any omission, would not have explained any doubt or obscurity, as the Court states, but what the Court fails to consider is that it would have corrected errors which Respondent admits existed in the profiles (R.3208). The contracts provide (R.4123):

> "If any errors or omissions are discovered in the plans, the same shall be brought to the attention of the Director of Public Service in order that the necessary explanation of corrections may be made before submitting the bid."

Not only does the Court ignore the "errors and corrections" provision of the contract, but concludes that a third dimension (depth) was contrary to the plans and specifications; yet, Respondent testified that the profiles were furnished for the purpose of providing this third dimension, the depth of excavation (R.3015). Action of the District Court was contrary to provisions of the con-

tract, on its own statement, and its reasoning in withdrawing such claims from the jury was contrary to the testimony of Respondent, which admitted that a third dimension (depth) was furnished with the original plans, but was grossly erroneous.

CONCLUDING STATEMENT

The Respondent, under its heading "Concluding Statement," page 24, quoted from the opinion of the Circuit Court of Appeals, which has already been treated, and references were furnished to show that evidence of the Respondent admitted that request was made for payment of some of these claims during the progress of the work; and this, together with the resolution of the City Commission, proposing to arbitrate the controversy in April of 1927, certainly upsets and proves there is no basis for the concluding statement of the quotation to the effect that "this conduct of the Construction Company does not add up to open and fair dealings."

Respectfully submitted, and dated this 17th day of August, 1942.

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